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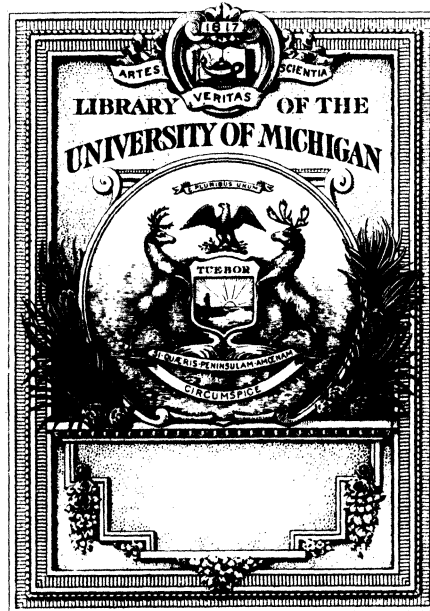
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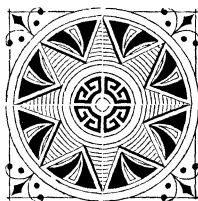
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THE GIFT OF
Major T. M. Spaulding

THIRTEENTH
ANNUAL REPORT
OF THE
HAWAIIAN HISTORICAL SOCIETY

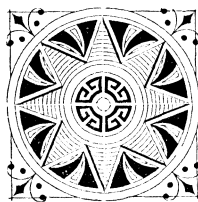


*WITH A PAPER ON THE DEVELOPEMENT OF
HAWAIIAN STATUTE LAW, BY CHIEF
JUSTICE W. F. FREAR.*

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.



THIRTEENTH
ANNUAL REPORT
OF THE
HAWAIIAN HISTORICAL SOCIETY



*WITH A PAPER ON THE DEVELOPEMENT OF
HAWAIIAN STATUTE LAW, BY CHIEF
JUSTICE W. F. FREAR.*

HONOLULU:
1906.

OFFICERS, 1906.

President.....	Prof. W. D. Alexander
First Vice-President.....	Rev. A. Mackintosh
Second Vice-President.....	Mr. J. S. Emerson
Third Vice-President.....	Hon. A. S. Hartwell
Recording Secretary.....	Hon. W. F. Frear
Corresponding Secretary.....	Mr. W. A. Bryan
Treasurer.....	Mr. W. W. Hall
Librarian.....	Miss Helen L. Hillebrand

Maj. J. M. Spaulding
9th.
4-11-1924

MINUTES OF ANNUAL MEETING, HELD JANUARY 22, 1906.

The annual meeting of the Society was held in its Library room at 8 p. m., January 22, 1906, the President, Prof. W. D. Alexander, in the chair.

The reading of the minutes of the last annual meeting and of the special meeting of July 13, 1905, was omitted, as those minutes had been published in the reports of the Society.

The following persons were elected to membership on the recommendation of the Board of Managers:

Corresponding members: Mr. Humphrey Berkeley, Mr. Howard M. Ballou.

Active members: Rev. W. E. Potwine, Miss Alice Shipman, Miss Pearl Wills, Mr. A. F. Griffiths, Mr. Perley Horne, Mr. A. Perry, Mr. D. L. Withington, Mr. M. F. Prosser, Mr. H. E. Highton.

The Board of Managers having recommended that the Society issue certificates of membership, the matter was referred to a committee, consisting of the president, treasurer and secretary, with power to act.

The reports of the corresponding secretary, treasurer and librarian were read and accepted and ordered published.

The following persons were re-elected officers for the coming year:

President.....	Prof. W. D. Alexander
First Vice-President.....	Rev. A. Mackintosh
Second Vice-President.....	Mr. J. S. Emerson
Third Vice-President.....	Hon. A. S. Hartwell
Recording Secretary.....	Hon. W. F. Frear
Corresponding Secretary.....	Mr. W. A. Bryan
Treasurer.....	Mr. W. W. Hall
Librarian.....	Miss Helen Hillebrand

Mr. W. F. Frear then read the paper of the evening on "Hawaiian Statute Law," which was requested for publication.

Remarks were made by Prof. W. D. Alexander and Dr. N. B. Emerson.

Mr. S. M. Ballou offered the Society for publication, in case the Congressional Library should not publish it, a complete up-to-date Hawaiian Bibliography, prepared during the last five years by his brother, Mr. Howard M. Ballou, of Boston. This offer was accepted by the Society. The meeting then adjourned.

W. F. FREAR,
Recording Secretary.

ANNUAL REPORT OF THE TREASURER FOR THE YEAR ENDING DEC. 31, 1905.

HAWAIIAN HISTORICAL SOCIETY IN ACCOUNT WITH W. W.
HALL, TREASURER.

Receipts.

1904.			
Dec. 2	Balance of cash brought forward.....	\$	7.56
1905.	Dues from E. W. Heusinger, St. Antonio, Texas		5.00
Jan. 3	6 months interest on McBryde Bonds.....		60.00
	Dues collected during the year.....		115.00
	Drawn from the Savings Bank Account...		30.00
	Received from sale of pamphlets.....		1.25
July 30	" interest on McBryde Bonds.....		60.00
Dec. 30	" " " " " "		60.00
		\$	338.81

Disbursements.

1905.			
Dec. 30	Paid for postage.....	\$	3.85
	" for poison75
	" salary of Miss Helen Hillebrand, one year (1904)		100.00
	" janitor for one year, 1905.....		21.00
	" for collecting dues, 1905.....		6.00
	" for two books.....		6.65
	" for Thrum's Annual, 1904.....		.75
	" for printing 12th Annual Report....		54.80
	" for printing notices.....		1.50
	" for stationery		2.75
	" for binding two volumes.....		3.50
	" for printing 500 copies of Paper No. 12		60.00

Deposited in Savings Bank.....	\$ 60.00
Balance to new Account.....	17.26
	<hr/>
	\$ 338.81
Balance on hand.....	\$ 17.26
Amount now in the Savings Bank.....	521.10
Two McBryde Bonds drawing 6 per cent. interest...	2,000.00

E. & O. Ex.

W. W. HALL, Treasurer.

ANNUAL REPORT OF THE LIBRARIAN.

To the Officers and Members

of the Hawaiian Historical Society.

GENTLEMEN:—As your librarian, I have but a brief report to present you for the past year.

Two books only have been purchased. Some other old ones, which were on hand, seemed desirable to add to the collection.

The accessions have been as follows:

Thompson: "Diversions of a Prime Minister," 1904 (purchased).

Tregear: "The Maori Race," 1904 (purchased).

Andrews: Vocabulary of Words in the Hawaiian Language, 1836.

Boehr: "Die Hawaiischen Inseln."

Cleghorn, comp.: "Letters of Condolence and Resolutions Upon the Death of H. R. H. Likelike," 1887.

Hawaiian Club Papers, 1868.

Hawaiian Evangelical Association report, 2 vols., 1868-99.

Legendre: "O na Mole o ka Anahonua," 1843 (geometry).

Legislative Reports, 1851, 1886, 1888.

Meheula and Bolster: "Ka Moolelo o Laieikawai."

Pigafetta: "Premier Voyage Autour du Monde," 1819-22.

Rosenberg: "Der Malayische Archipel," 1878.

The collection of Hawaiian books and pamphlets, presented to the library by Dr. Hyde, has been arranged and indexed, with the assistance of Miss Carrie Green in the translating. A list was also made of the miscellaneous papers in the drawers of the large book-case.

Reports and papers of the various institutions, with whom we exchange our own publications, have been received.

A number of volumes of the Transactions of the New Zealand Institute were given to the Department of Entomology in the Territorial Board of Agriculture, where they are of greater use, than they can be in this library.

Our membership at the present date numbers 109. There have been 4 new members, 3 withdrawn, 1 dropped for non-payment of dues, 1 removed from the Territory and 2 deaths.

Practically all the desirable pamphlet material has been sorted and indexed, so that I hope, during the coming year, to begin classifying and re-arranging the bound volumes of this library. an important work that has not yet been done.

Respectfully submitted,

HELEN L. HILLEBRAND,
Librarian.

REPORT OF THE CORRESPONDING SECRETARY FOR THE YEAR ENDING NOV. 28, 1905.

I am pleased to be able to report that there is unmistakable evidence of an awakened interest in historical matters in this community. While the year 1905 has been uneventful so far as the Society has been concerned the establishment of a public archives commission, consisting of the Secretary of the Territory, Mr. A. L. C. Atkinson, Dr. W. D. Alexander and Mr. A. F. Judd, who have placed Mr. Robert C. Lydecker in direct charge of the archives, together with the erection of the public archives building, (to be completed early in 1906,) make the year just ending the most satisfactory from a historical standpoint in the life of this organization. The mine of public documents, which have so long been stored and inaccessible, will now become live matter historically, and should furnish material for a large number of important papers that should be presented before this Society.

There are a number of collections of valuable documents relating to the early history of these Islands still stored in private homes. The danger of loss by fire or from other causes makes it important that such material should be transferred to the custody of this Society, or that of the public archives commission for safe-keeping until it can be preserved by that art preservative of all arts.

The Society has held but one special meeting during the year. This occurred on July 13th, 1905, and at that time three papers were presented, which have since been published as No. 12 of the papers of this Society. The contributions were, "The Reversal of the Hawaiian Flag," by Howard M. Ballou, of Boston; "Social and Political Changes in British Polynesia," by Dr. W. D. Alexander, and "A Kona Storm," by Hon. Gorham D. Gilman, of Boston. I would add in passing that the published papers and reports of this Society are being

more and more appreciated, both at home and abroad. Various societies and libraries are anxious to secure missing copies for their sets—some of which can no longer be furnished from the Society's duplicate files.

The Landmarks Committee have been at work collecting data relative to the points of historic interest about the group, and have now a considerable amount of important corroborative testimony, which it has been in many cases necessary to secure before some points could be definitely settled. It is believed that the general interest, which is everywhere manifest in this matter, will crystallize in such a way that the next legislature will see fit to provide funds to carry on the work, which has been so well begun, and cause suitable marks to be established at such places as the committee may recommend to be marked. The unveiling at Punahou on April 19th of the Bingham tablet, commemorating the gift of the Oahu College grounds in 1840, is of interest in this connection and sets for the Landmarks Committee a splendid precedent.

A number of contributions are now ready or in course of preparation to be read before the Society. Among these are papers by Dr. Alexander, Mr. Ballou, Mr. Lydecker and Mr. Thurston. The indications are that the year 1906 will see some good work done by members of the Society. Our New Zealand friends continue most active, and a large amount of valuable material is being published in the "Polynesian." A perusal of that journal will show our members some of the important things of similar character yet remaining to be done in Hawaiian history and mythology.

Dr. N. B. Emerson's paper on the "Unwritten Literature of the Hawaiians," has been having a final revision and its early publication is confidently expected. Dr. W. T. Brigham has a comprehensive memoir on "Hawaiian Mats and Baskets," almost through the Bishop Museum press. This is uniform with his previous memoirs on "Hawaiian Feather Work" and "Stone Work," and will carry with it a supplementary chapter on nets and netting, by Mr. J. F. G. Stokes. The Hawaiian Annual, which under the careful hand of Mr. T. G. Thrum

has long been the recognized book of accurate information about Hawaii, carries an unusual amount of historical matter in the 1906 edition. The author takes occasion in this, the thirty-second number, to give an index to the important articles which have appeared in the *Annals* up to this time. We note that over a hundred important articles on Hawaiian history and folk lore are there indexed. The present number has thirteen special articles on historical topics.

The rediscovery of the heiau of Kupopolo, in the neighborhood of Waialua, was of sufficient interest to the public to induce the Hawaii Promotion Committee to invite a representative committee of the Hawaiian Historical Society with others to visit the ruins, in the hope that some plan looking to its restoration might be hit upon. After careful inspection the committee made a full report, copies of which appeared in the daily papers at the time and which now form a part of this report.

Honolulu, T. H.,

Mr. E. M. Boyd,

Secretary, Hawaii Promotion Committee,

Honolulu, H. I.

Sir:—The committee from the Hawaiian Historical Society invited by you to visit the ancient heiau of Kupopolo, recently reported by Mr. T. G. Thrum, for the purpose of advising a course to be pursued in reference to the preservation or restoration of the same, respectfully report as follows:

Through the courtesy of Manager F. C. Smith of the Oahu Railway and Land Company a special train was provided for the accommodation of our party, personally conducted by both Mr. Boyd and Mr. Smith. The trip was made August 9th and some two hours were spent on the ground investigating the condition and peculiarities of the dilapidated structure.

As had been reported the heiau is near the line of the rail-

road and easy of access, being located beyond the Haleiwa Hotel, near the western point of Waimea, Oahu. It is above the average size, and the walls are in fair condition, considering their great age and exposed situation, and in themselves prove an object of deep interest. This ancient temple lies parallel with the shore line, northeast and southwest. Its front wall measures 266 feet in length and seemed originally to have been about ten feet high. The structure is divided into two separate enclosures, the northern one being 112x92 feet (inside measurements) and the adjoining southern one 150x110 feet; the two embracing an area of about four-sevenths of an acre. The front wall seems to be of double construction. A base some four feet high runs the entire length in front and extends around the northern end. Above and about three feet within this base rise the walls proper. Both of the enclosures are filled with stones, the outer portions being much disturbed while the central part is fairly well paved. In the rear of the large enclosure a terrace runs across, evidently once paved. The main part of this southern division contains several piles of stones which, as well as a walled enclosure about the middle of the wall at the southwest end may have much significance.

Unfortunately little was found on which to base a clear idea of the original plan of the heiau of Kupopolo, save the site of the priest's house at the inner corner of the northern enclosure. Other important features were sought for in vain. Nor were there found in either enclosure sufficient points of resemblance between this and other known heiaus to warrant a safe conjecture for a plan of complete or partial restoration.

The committee were impressed by the accessibility of Kupopolo. We believe that this fact taken in connection with the limited number of heiaus yet remaining on this island is sufficient to maintain it as a point of unfailing attraction to tourists and others interested in Hawaiian antiquities. We would urge the importance of preserving and marking this, as well as all similar points of interest in the Islands.

Since there is not available sufficient data on which to base

a plan of restoration, the committee is agreed as to the advisability of taking steps to repair the walls so as to prevent their further deterioration, and thus to prepare a way for future restoration or study when a better insight into Hawaiian temple structures of this class is to be had. We believe that a deeper historic interest ever prevails over well-kept ruins than can be maintained by restoration on false or misconceived lines. We would therefore recommend that steps be taken looking toward preservation rather than restoration, and that some suitable means of approach be constructed, and, if possible, means be provided to prevent ruthless intrusion.

DR. N. B. EMERSON,
Chairman of Committee.

Approved:

T. G. THURM,
WM. A. BRYAN,
REV. SERENO BISHOP,
A. F. GRIFFITHS,
W. W. HALL.

One of the most interesting communications your secretary has received during the year is a letter from our president, Dr. W. D. Alexander, part of which is as follows:

"Mr. Humphrey Berkeley, Barrister, who acted as counsel for Mr. James Bicknell in the law suit over the possession of half of Fanning's Island and won his case, afterward bought Mr. Bicknell's interest in the same. While exploring his new estate, he unearthed the foundations of a stone building over a hundred feet in length; I forget the exact figures. It was oriented exactly east and west. The corners were peculiar. Instead of fitting blocks together at the corners, one large stone at each angle was cut out like a letter 'L.' Some of the stones would weigh ten tons apiece. The stone of course was coral or limestone.

"Not far from this building he discovered a tomb which he opened, and found various objects, which he brought with

him on his way to England and showed to Mr. Brigham and myself. Besides some human bones, there was a poi pounder (of gypsum I think) similar to one in the Museum from the Paumotu group, where stalactites of that material are found in caves, but more artistic; perforated porpoise teeth for ornaments, shell ornaments, and bones of a fowl and apparently those of a dog.

"When Fannings Island was discovered a century ago it was wholly uninhabited. The people now there are temporary residents, brought from Manihiki to gather copra. You can see from the map how isolated that island is. So there is another ocean mystery to be solved."

A valuable historical and ethnological find was made by Mr. D. Forbes and two companions on the island of Hawaii recently. While exploring a cave on the Hamakua side of the island a number of rare and unique specimens were secured, which we understand have been photographed. It is hoped that copies of the photographs may be had for examination at a future meeting.

In closing I would continue to urge the importance of a new bibliography for the Hawaiian Islands. The one published years ago by Mr. J. F. Hunnewell has long been out of print. The importance of getting on record every scrap of folk lore that is obtainable before it is too late has been repeatedly urged by my predecessor, and it is to be hoped that the new year will see this work taken up by our members.

WM. ALANSON BRYAN,
Corresponding Secretary.

HAWAIIAN STATUTE LAW.

Read before the Hawaiian Historical Society at its Annual Meeting, January 22, 1906.

BY W. F. FREAR.

In a paper¹ presented to this society twelve years ago, not long after the passage of the act to reorganize the judiciary department, I endeavored to trace the evolution of the Hawaiian judiciary. Now that these islands, after a century of remarkable political change and rapid legal growth, have reached a status that bids fair to endure for a considerable time, and now that the entire body of Hawaiian statute law has been consolidated and revised,² it seems an appropriate time to attempt to outline the development of Hawaiian legislation and the Hawaiian legislature. The central thought of this paper, as of the former paper, is that the present status has been attained by a process of growth. The fundamental causes of this development, as shown in that paper, have been the introduction of foreign peoples, ideas and customs, the gradual civilization and Christianization of the native race, and the general political, social and industrial progress of the country. Hawaii, indeed, furnishes the one conspicuous example of such a swift transformation by internal development through foreign influence as distinguished from a forced change superimposed from without.

EARLY PERIOD—BEFORE ADVENT OF FOREIGNERS.

Prior to the reign of Kamehameha the Great, which began in 1782, four years after the discovery of the islands by Captain Cook, the group was divided into a number of kingdoms, which, like those of early English history, were often at war

¹ Papers of Haw. His. Soc., No. 7.

² "Revised Laws of Hawaii," enacted Feb. 27, 1905.

with each other. The feudal system had become established, with the king as lord paramount, the chiefs as mesne lords and the common man as tenant paravail—sometimes as many as seven degrees in all. Each held of his immediate superior in return for military and other services, and each exercised all the functions of government indiscriminately, subject to his own superiors. The laws were mostly customary, many doubtless having their origin in the edicts of early kings, the majority of whom had been forgotten as law givers, but the names of the most famous of whom were handed down with the laws,—as in the case of Mailikukahi, king of Oahu, about five centuries ago.¹ General laws were thus enacted by the king, and subordinate laws in the nature of local ordinances for their respective jurisdictions by the successive grades of chiefs. The king consulted his counsellors, the high chiefs, a sort of witenagemot or embryo legislative body, to a greater or less extent according to the importance of the law contemplated, as he did also on other important matters, such as a question of declaring war. A council of chiefs was also usually held upon the death of a king to determine whether to approve the successor, if any, named in his will or elect another at the risk of war. The deliberations of the king in council were generally conducted in great secrecy and those who spoke did so in language that was highly figurative, beautiful and expressive.² The result was proclaimed by the king and published by heralds and messengers—hereditary and honorable officers—who took the messages to the chiefs of districts, by whom in turn they were passed on to inferior chiefs and by them to the masses. They were preserved in living statute books, namely, by a class whose business it was to memorize

¹ This king is said to have enacted laws against theft and rapine, with the death penalty; to have required first born male children to be turned over to the king to be brought up and educated; to have caused boundaries to be surveyed and marked; to have built temples and discountenanced human sacrifices, &c.,—with the result that thrift and prosperity prevailed and population increased. 2 Fornander, *Poly. Race*, 89.

² Wm. Richards, 25 *Miss. Herald*, 372; 4 *Ellis, Poly. Researches*, 116; *Jarves, Hist.*, 34.

and teach them and hand them down to succeeding generations. Although there was considerable law it was largely of an indefinite nature and all subject to much arbitrariness in its administration; and although there was an organized system of government it was aristocratic and the welfare of the lower orders was little considered. The largest and most oppressive body of laws consisted of the taboos, which were imposed partly for religious and partly for political purposes, the religious and political systems being closely interwoven. Most important were the laws of real property, upon which the political system was based, including the laws of tenure, taxation, fishing rights and water rights, the last named being so important as to give their name, *kanawai*, to law in general. There were laws also relating to personal security, personal property, domestic relations and barter. The criminal laws were directed chiefly against murder, robbery, theft, adultery and breaches of etiquette toward superiors. Owing to the number, power and rapacity of the mesne chiefs, taxation and graft were such that scarcely a third of a common man's product remained to him and he could not count on retaining that. There was no encouragement to industry, as both the tenure of land and the security of personal property were uncertain. There were courts, both civil, held by the king and chiefs, and ecclesiastical, held by the priests, but they were of a rude nature, subject to favoritism, and the penalties imposed were discretionary as to both character and amount. Punishments were of great variety and sometimes of extreme cruelty. There were some restraints, however, upon the power of the king and the chiefs. Public sentiment compelled to a remarkable extent observance of the customary laws. The "wise men" counselled moderation and prophesied judgment in case their instructions were not regarded. The laws, moreover, recognized the rights of recaption and retaliation. There was also a right of appeal to a higher chief or the king, and finally

the right of leaving one chief for another,—for the common people were not bound to the soil.¹

KAMEHAMEHA'S REIGN—BEGINNING OF FOREIGN INFLUENCE—1782-1819.

Kamehameha I gained the supremacy and united the group under one government.² Like several of the early English conquerors, he divided the country into four earldoms, so to speak, corresponding in the main with the ancient kingdoms, and appointed governors over them. These were in the nature of viceroys, with legislative and other powers almost as extensive as those of the kings whose places they took. He raised his favorite queen, Kaahumanu, to the position of a premier or chief justiciary and placed in her hands "life and death, condemnation and acquittal," and by his will continued her in that office under his son and successor, Liholiho or Kamehameha II, whom also he appointed by will. This office of *kuhina nui*, as it was called, was one of power almost equal to that of the king, for its occupant had a veto power over the important acts of the king, and thus the two stood to each other somewhat in the relation of Roman consuls, although the king was always regarded as the superior.³ He selected four high chiefs as special counsellors, a sort of cabinet, or privy council, and also four "wise men" as lawyers and assistants,⁴

¹ See, in general, "Evolution of the Hawaiian Judiciary," by the writer, *Haw. His. Soc. Papers*, No. 7, pp. 1-6; 4 Ellis, *Poly. Researches*, 305 et seq.; Jarves, *Hist.*, 31 et seq.; manuscript, of March 15, 1841, Public Archives, prepared by Wm. Richards for Commodore Wilkes.

² He began as king of one-half of Hawaii; by 1795 he had conquered all the islands except Kauai and Niihau, which were ceded to him in 1810.

³ It is commonly supposed that this office was created by Kamehameha I, because of the weakness of his son and successor, when at his death he announced his will: "The kingdom is Liholiho's and Kaahumanu is his minister," but apparently the office was already in existence. See *Const. of 1840*, Blue Book, p. 13; Appendix to Second Supp. to *Inves. of Mr. Charlton's Land Claim*, pamphlet, 1847, p. 36; Dibble, *Sandwich Is.*, 227 et seq. Its importance was doubtless greater after Kamehameha's death than before. It was abolished by the constitution of 1864.

⁴ The counsellors were Keeaumoku, Keaweheulu, Kameeiamoku and Kamanawa; the wise men were Kai, Kapaloa, Kaaloa and Kauakahiaka-haola. 2 *Haw. Spec.* 222, 225.

and consulted much with his able and faithful chief executive officer² and several trusted white men,³ who had long resided in the islands. On more important occasions he summoned the governors and high chiefs from all the islands to a national council. He put an end to wars, erected a strong central government, checked the oppression of the lesser chiefs, appointed officers more for merit than rank, improved the laws, made them more uniform, rigidly enforced them, and generally brought about a condition of comparative peace and security. He was particular to publish the laws throughout the group and set the good example of living up to them himself. His more important laws were directed against murder, robbery, theft, extortion and confiscation. The most famous was that called the *mamalahoa*, to the effect that the aged, men and women, and little children might lie by the roadside and not be molested.⁴ He also made laws imposing harbor charges on foreign vessels other than public vessels. During his reign many foreign vessels⁵ touched at the islands, and as a result of the influences, good and evil, but principally evil, from contact with the visitors, the Hawaiians lost respect for their idolatrous religion and oppressive taboo system,⁶ and about six months after his death, which occurred on May 8, 1819,

² Kalaimoku or Kalanimoku, called the Iron Cable of the country; died Feb. 8, 1827.

³ Particularly John Young, Isaac Davis and Don Marin. Bingham, Sandwich Is., 51.

⁴ This law, like most other early laws, did not define the penalty for its violation. It was a stringent law and the penalties were severe. For its origin, see N. B. Emerson, Paper in Tenth An. Rep., Haw. Hist. Soc., p. 26; Hopkins, in Thurston's An., 1906, p. 81. Other laws of Kamehameha I were known as the *papa* and *Waiohuhukini* or *Waioahukini*.

⁵ The first after Capt. Cook's death in 1779 arrived in 1786.

⁶ Not that they looked for something higher, but that they desired relief from the exactions of the taboo system, and mustered courage to abolish that when they lost respect for the religious system which was its supernatural support. The chiefs, of course, were the principal actors, though the people, like them, had become much prepared for the change.

this was abolished by law, not, however, without a bloody battle. This was one of the most important statutes ever enacted in Hawaii. Not only did it open the way for the introduction of Christianity and civilization generally, but by the divorce of the political and religious systems, one of the greatest obstacles to the growth of a young nation was avoided.

CRUCIAL PERIOD—FROM ARRIVAL OF MISSIONARIES TO
FIRST CONSTITUTION—1820-1840.

The first company of missionaries arrived from New England in April, 1820, the year after the death of Kamehameha and the abolition of the religious and taboo systems. Many other companies followed. Other foreign residents were slowly and foreign visitors rapidly increasing in number. Although there were many exceptions, a large proportion of these foreigners were of the class, so numerous in those days throughout the Pacific, who lived up to the motto that "there was no God this side of Cape Horn."³ The next twenty years were to decide which of these elements was to win in its influence upon the natives. There were these differences in their methods. Although foreigners other than missionaries, both residents and visitors, both the better and the worse classes, were not backward in advising the chiefs in matters of government, the worse element took more active measures in the form of threats and armed attacks against the enactment and enforcement of salutary laws, while the missionaries, acting under strict instructions from the board which sent them out, went, as remarked by disinterested observers at the time, to the opposite extreme and as a rule declined so much as to give advice in political affairs, even when asked for it by the chiefs. But many of the chiefs, like the great Kamehameha himself,

³ See W. D. Alexander, *Hist.*, 193. "Civilized man turned savage is more dangerous than the savage born, and their presence in heathen lands is a greater obstacle to Christianity than heathenism itself." J. M. Alexander, *Mission Life in Hawaii*, 83.

were men and women of discernment and strength¹ and were not easily deceived or daunted by designing or threatening adventurers.

The missionaries had learned the language, completed the alphabet and begun printing the spelling book by the first Monday of January, 1822; by 1825 they were printing nearly 1,500,000 pages a year; by 1830, 5,000,000 a year, and two presses were then inadequate to supply the demand; in 1837, they printed nearly 18,000,000 pages; by 1840, they had three presses at work and had printed in all 100,000,000 pages, covering perhaps 50 different works. In 1834 two newspapers were published in the Hawaiian language. They established schools, and by 1826 had 25,000 scholars, mostly adults, or one-sixth of the population. In 1831 they founded a higher institution of learning at Lahainaluna for the training of teachers and religious assistants, the graduates of which were destined during the next ten years to exercise a powerful influence, through their newspapers and otherwise, upon public sentiment in favor of popular rights and improved laws and to take a prominent part in drafting such laws. In 1832 there were 900 schools with as many native teachers, and 53,000 scholars. Probably no other people has ever evinced so ardent a desire for learning.² Churches were established, which were attended by thousands, and Christianity soon came to be regarded in a

¹ They were not only of strong character; they were large physically; several of the female chiefs were over six feet tall and one male was six feet six inches; a number, males and females, weighed over three hundred pounds each.

² The result evoked much admiration in America. Chancellor Kent wrote at the time in a note to his commentaries, vol. 2, p. 199: "The rapid transformation of the natives of those islands from being savages and heathens in 1820, to, in 1830, a civilized and Christian people, is very remarkable, and reflects honor, not only on the mild and teachable disposition of the natives, but also on the diligence, discretion, fidelity, and zeal with which the missionaries have devoted themselves to fulfill the purposes of their trust." Special boarding schools were established in various places, the curriculums of which included more or less industrial training.

general way as practically the national but of course not the state religion, although little interest was taken in it as a personal matter until, beginning quietly in 1829, when there were 185 church members, of whom 117 were admitted in that year, it slowly but steadily warmed until it finally burst forth in the "Great Revival" of a decade later, which took into the church a fifth of the population.¹

It is not strange that under the influence of their new learning and religion the chiefs grew more humane toward their dependents and more observant of their rights, and that the common people began to learn that they had rights. Accordingly, the customary law, which still constituted the bulk of the law, gradually but rapidly sloughed off much of its old barbarity and absorbed the principles of the Bible and of foreign laws as far as they were known.

Most of the chiefs and the more intelligent common people soon began to realize also that, if they were to progress and maintain themselves as a nation in contact with the superior white races, they must have laws that were more definite and more enlightened. The weakness of the king, his later departure to England, where he died, and the long minority of his successor, favored the growth in power of the council of chiefs. All three functions of government were still exercised indiscriminately by king, governors and chiefs, acting singly or together. Thus, there were trials by the *aula regis*, the privy

¹ See, in general, Miss. Her., particularly vols. 18-37; Report to Legislature by Wm. Richards, Sup't. of Pub. Instruction, Aug. 1, 1846; Anderson, Haw. Is., pp. 88, 254, 259. The greatest interest in education and religion was taken by the most influential natives, namely, the chiefs, of whom many could read and write by the end of 1822, the year in which printing began. In 1824 they gave orders to establish schools throughout the islands, and thereafter the schools were largely under their patronage and supported mainly by the government. Of the ten persons who joined the church in 1826, nine were chiefs. The total church membership in 1837 was only 1259; in 1840 it was about 18,000. By 1846, 70,000 persons or about 80 per cent. of the then population, could read. The New Testament was completed in 1832 and the Old in 1839.

council or its judicial committee, the house of lords, and the baronial courts, as it were. The chiefs constituted also a sort of cabinet or privy council and as such were often summoned in greater or less numbers on important occasions for purposes other than the enactment of laws, as, for instance, to pass upon a treaty or an appointment of a king, a regent or a premier.¹

More salutary statutes began to be made—especially after the regent, Kaahumanu's, conversion early in 1825. These were mostly oral at first. The oral law abolishing idolatry and the taboo system has already been referred to as made shortly before the arrival of the missionaries. Among subsequent oral laws were the following:

In 1825, on the advice of Lord Byron, who brought the bodies of the king and queen from England, trial by jury in capital cases was adopted, and the execution of the death penalty, which had previously been by assassination,—generally by stoning, clubbing or strangling the victim, or, after the introduction of edged tools, by beheading him, from behind or when he was asleep—was changed to hanging. Such methods of trial and execution were observed thereafter in all

¹ They met thus when, in 1819, they confirmed Kamehameha I's appointment of his successor and the premier, Kaahumanu; and when, in 1823, they confirmed Kamehameha II's appointment of Kaahumanu as regent during his visit to England; and when, in 1825, they confirmed his appointment of his successor, Keaukeaouli or Kamehameha III, and continued the said regent in office during the king's minority; and when, in 1826, they ratified the first treaty with the United States; and when, a little later, they met to try charges which the hostile whites made against the missionaries but which collapsed, and when, the following year, they met to try charges against the missionary Richards and decided to protect him when threats were made against his life by certain foreigners; and when, in 1832, they confirmed the appointment of Kaahumanu's successor, Kinau; and when, in 1833, the king assumed the full powers of his office and appointed Kinau premier. Some early writers refer to Kalaimoku either as sole regent or as a joint regent with Kaahumanu, but he was neither.

capital cases.¹ It may be noted here that punishment by mutilation, such as scooping out the eyes or breaking the legs, as well as human sacrifices, had already ceased.

As one result of intercourse with foreigners, drunkenness had become almost universal among the Hawaiians. But about the year 1825 the traffic and use of intoxicating liquors was prohibited to them, and by 1826, such drunkenness had greatly decreased, and by 1829 there was almost none.

The Christian form of marriage had been solemnized as early as August 11, 1822, and was regarded as in a sense officially recognized when it was observed by Governor Hoapili, of Maui, in October, 1823, but for several years his example was little followed. In 1826, however, the chiefs of that island and in 1827 those of one of the districts of the island of Hawaii made it obligatory. Offenders against these laws were required to work on the public roads. Finally Kaahumanu made a general law against bigamy and desertion, confirmed marriages already entered into according to former customs, and required the Christian form of marriage in the future, and by 1829 that form had become general.²

The laws against licentiousness, particularly that of 1825 prohibiting females from visiting vessels in port, were the ones that caused the greatest storm of opposition from foreigners during the '20s. Many vigorous protests and threats were made in order to secure the repeal of these laws, and on a number of occasions in 1825, 1826 and 1827, the officers and crews of visiting vessels went to the length of making armed attacks on the houses of some of the missionaries³ and natives

¹ From that time to the end of the period now in question, that is, 15 years, there were 3 executions for murder on Kauai, 7 on Oahu, 2 on Maui and 1 on Hawaii. See Manuscript of Mch. 15, 1841, *supra*.

² See Bingham, *Sandwich Is.*, 166; 25 *Miss. Her.*, 53; 26 *Id.* 312; *Blue Book*, 71; Dibble, *Sandwich Is.*, 240.

³ Richards and Bingham, to whose influence these laws were attributed by such foreigners. See Alexander, *Hist.*, 194-199, for accounts of these attacks.

and once on the house of the prime minister, Kalaimoku. Once they bombarded the town of Lahaina.

In 1825 a council of the chiefs was called for the purpose of enacting laws in harmony with the ten commandments, which had already been published; but the meeting was broken up by foreign intruders aided perhaps by the reactionaries among the chiefs.¹

The following is one of the earliest as well as most comprehensive of the oral statutes of this period and the description of its enactment is given in full as the most definite that we have. It is by Mr. Richards,² who was probably an eyewitness:

"On the 22nd of June, 1824, Kaahumanu published several laws at Lahaina in the manner and form following:

"While there were a thousand people within hearing, she called the head men of the several districts on the island, and ordered them to publish by a herald, the following laws:

"'1st. There shall be no murder.'

"Here she spoke at large respecting the practice of infanticide, which is still very prevalent here. She said that this was specially included in her prohibition of murder.

"'2dly. There shall be no theft of any description.'

"'3dly. There shall be no boxing or fighting, among the people.'

"'4thly. There shall be no work or play on the Sabbath, but this day shall be regarded as the sacred day of Jehovah.'

"'5thly. When schools are established, all of the people shall learn the *palapala*.'" It will be noticed that the penalties were still left discretionary as to both character and amount. The fifth chapter of this code was the first school law. It made

¹ Dibble, Sandwich Is., 239, implies that the commandments were enacted as law, but that apparently was not the case—as shown by subsequent acts and statements of the chiefs and by statements of other writers. See, e. g., Bingham, Sandwich Is., 282; 2 Stewart, Visit to South Seas, 149; 23 Miss. Her., 203; Refutation of charges against Am. Miss., pamphlet, 1841, p. 10.

² 22 Miss. Her., 240.

attendance compulsory, when there were school accommodations, and applied to adults as well as children.¹

We come now to the written statutes. The first of these was a law of June 2, 1825, signed by the prime minister, Kalaimoku, in regard to the entry and clearance of vessels, the desertion of seamen, and harbor and pilot dues at the port of Honolulu.² Other laws of a somewhat similar general character were one of June 4, 1831, by the king and Governor Kuaikini for the port of Hilo, one of November 5, 1833, by Governoress Nahienaena for the Lahaina market, one of October 14, 1834, by the king for the port of Honolulu, and one of August 1, 1836, by Kinau, Auhea and Paki in the form of an order to the pilot at Honolulu designed to prevent the introduction of smallpox.

The opposition to the oral laws of 1825 had been shared in by the British and American consuls, who, among other things, threatened the king, and endeavored to persuade him that the regent and chiefs had no authority to make any laws, and that

¹ As shown in note above, the pupils were mostly adults for some years after this. The chiefs had already ordered the establishment of schools. See note *supra*.

² It is often stated that the first printed laws were enacted in 1833, probably because that is the earliest date borne by any law in the compilation of 1842, known as the Blue Book; it is sometimes stated that the first printed laws were those of 1827, and they were the first of a general nature. The only evidence tending to show that there were earlier printed laws than this of 1825 is a statement by Mr. Richards in his preface to the Blue Book that some of the laws in that book were enacted as far back as 1833, and "others had their origin as early as 1823," but either this last was a mistake on his part or a typographical error, or else, which is probably the case, it referred to oral laws, for the same writer in his report as Minister of Public Instruction to the legislature, on Aug. 1, 1846, says: "The first law ever promulgated by the press in the Hawaiian language related to the harbor of Honolulu and was printed in 1825"; in the first manuscript draft of this report, in the Public Archives, he says "in June, 1825." It was common at that time to refer to oral laws as "laws" or even "published laws," and at page 71 of the Blue Book, there is what was apparently an early oral law. Nearly all of the written laws prior to 1840 referred to here have recently been found in the Public Archives.

even the king himself could not make laws applicable to foreigners. The king himself then, in 1827, with the concurrence of the regent and chiefs, courageously published the following, which is the second written law and the first of a general nature, and which is, indeed, like Kaahumanu's oral law of 1824, a little penal code:

“Proclamation of the law.

“We proclaim these laws to all people of foreign lands and of this land. Hear ye all and keep and obey them, both foreigners and natives.

“I.

“We forbid murder. Let no foreigner or native commit murder here. Whoever shall be guilty of murder shall die.

“II.

“We forbid theft. Whoever steals shall be put in irons.

“III.

“We forbid fornication. Whoever is guilty shall be put in irons.

“IV.

“We forbid the selling of rum here. Whoever shall sell rum shall be imprisoned.

“V.

“We forbid prostitution. Whoever shall commit fornication shall be fined.

“VI.

“We forbid gambling. Whoever gambles shall be impris-

oned. Oahu, Honolulu, December 8, 1827. King Kauikeauli."¹

It will be noticed that in this code the nature of the punishments was prescribed but that the amount was still left discretionary.

The British consul, Charlton, who was at the head of the disturbing foreign faction, then claimed that the islands had been ceded to his government² and that the king could not enact laws without the concurrence of Great Britain, and threatened

¹ Although these six laws were thus put in writing, signed by the king and printed, they were really enacted by the king and chiefs and proclaimed orally like other previous laws. It was this way: When the first three of these laws had been decided upon, a general assembly was called, which was attended by the king, regent, chiefs and a great concourse of common people, including some foreigners. This was under a grove of cocoanut trees near the sea. Mr. Bingham had been asked to attend and open the exercises with prayer if he did not fear harm from the hostile foreigners, and had replied that he would do his duty even if they burned him for it. He was given a chair by Gov. Boki, and a little later, when the regent handed him a hymn book, he sung a hymn, offered a prayer and withdrew. The king and regent then each addressed the chiefs and people and foreigners, proclaimed the first three of these laws and called on all to hear and obey them. Notice was also given of other proposed laws, which were not to be put in force until the people had been further educated up to them. After adjournment, the missionaries were requested to print on handbills these three laws and the other three, which apparently had been proclaimed on a previous occasion. See 24 Miss. Her., 209. It may be noted here that during this period the king and chiefs generally endeavored to have the people instructed in regard to the subject matter of laws before enacting them, and in some instances the laws were at first more in the nature of advice than strict laws. Even as late as 1838, notice was given in advance of proposed laws. See note infra on liquor laws.

² This claim was based on an alleged session by Kamehameha I to Captain Vancouver on Feb. 25, 1794. The king and Vancouver apparently misunderstood each other—speaking through an interpreter. The former and his chiefs meant to obtain some protection and aid but not to make a cession. Even on Vancouver's understanding, the negotiations related only to the Island of Hawaii and the agreement was never ratified or acted on by the British government. Charlton's commission as consul to a foreign state refuted his claim.

the vengeance of his country if the king did so. The king and chiefs, however, again displayed their courage by publishing, on September 21, 1829, a law in regard to fornication, adultery and marriage, which of course aroused further opposition. Among the penalties for a breach of this law was a fine of \$200 for first, second and third offenses and forfeiture of lands for a fourth offense in the case of a chief and only a fine of \$15 in other cases—indicating that persons of rank, intelligence and wealth were no longer to be subjects of favoritism, but on the contrary that higher standards were to be required of them.

A little later an incident occurred which gave the king an occasion for taking a most important step. A cow belonging to a foreigner was killed by a native when trespassing on the latter's land. Two foreigners at once proceeded armed and on horseback to the native's house, seized him, pinioned his arms, put a rope about his neck and dragged him through the streets. The British consul and others thereupon, overlooking the action of the foreigners, represented to the king that if the natives dared to kill a cow they might kill a person and that, therefore, their lives and property were in danger, and demanded protection and an immediate reply that it might be sent to the British government. The king in response issued a proclamation, dated October 7, 1829, in which he diplomatically granted the request for protection and then boldly stated that the laws of this country "prohibit murder, theft, adultery, fornication, retailing ardent spirits at houses for selling spirits, amusements on the Sabbath day, gambling and betting on the Sabbath day and at all times," also that the laws required Christian marriage, and that these laws would be enforced against foreigners the same as against natives. He then showed the lawlessness of the foreigners in taking the law into their own hands and not following the usual course for obtaining protection or redress, and their unfairness in killing animals of natives without giving notices against trespassing, and at the same time allowing their own animals to trespass on the lands of natives after the latter had given such notices.

The position of the king and chiefs was greatly strengthened a week later by the fortunate arrival of the United States sloop of war "Vincennes," Captain Finch, with gifts and a message from the President recognizing the authority of the regent and expressing the view that foreigners were bound to obey the laws. This proclamation was regarded as marking the final and unequivocal stand taken by the king and chiefs for the right to make and enforce laws applicable to all within their territory. It is significant to us for another reason also, for it contained the first written declaration of the composition of the council of chiefs, which was later to be called as it was already in fact the House of Nobles, and it was therefore the first step towards reducing the unwritten to the written constitution. It named the king and regent and ten chiefs as entitled to sit in the council.¹

On July 5, 1832, Kinau, who took the title of Kaahumanu II, proclaimed her succession to Kaahumanu I, who had just died, and, among other things, that "according to law shall be the dispossession of land,"—the first official written recognition of the growing security of land tenures.²

Among the laws in the '30s that created friction with foreigners were those in regard to intoxicating liquors. On

¹ For accounts of the cow incident, see 2 Stewart, *Visit to South Seas*, p. 150; Bingham, *Sandwich Is.*, 350; a copy of the proclamation is also set forth in each of these works except that in the latter the preliminary statement in regard to the council of chiefs, is omitted, which reads as follows: "These are the names of the king of the islands, and the chiefs in council: Kauikeaoutli, the king, Kaahumanu, Gov. Boki, Gov. Adams Kuakini, Manuia, Kekuanaoa, Hinau, Aikanaka, Paki, Kinau, John Ii, James Kahuhu." It seems that these all signed this statement, (App. to Second Supp., &c., *supra*, p. 11) which was apparently intended as a definite and authoritative declaration to foreigners of the composition of the legislative body and council of state.

² The king issued a proclamation at the same time, announcing Kinau's succession and that "we two who had been too young and unacquainted with the actual transaction of business now for the first time undertake distinctly to regulate our kingdom." Other statements in these proclamations are regarded as showing with other evidence that Kinau was appointed Kaahumanu's successor by Kamehameha I.

March 25, 1833, a law was enacted requiring licenses for the retailing of spirituous liquors; in 1835, a law prohibiting drunkenness; on March 20, 1838, a further law on retailing spirituous liquors; and on August 21, 1838, a law prohibiting the importation of spirituous liquors and imposing duties on wines.² This last is the first law with a formal enacting clause—"Be it enacted by the King and Chiefs of the Hawaiian Islands, in council assembled:"—thus clearing recognizing the existence of a distinctly legislative body. Previously, when the chiefs were mentioned in a law signed by the king it was by some such expression in the body of the law as "I with my chiefs."

On May 9, 1839, a law was passed respecting times for paying duties; and on May 29, a law relating to quarantine, health officers, and a board of health for each harbor, and a law relating to insignia of office, forbidding the use of the golden ribbon on the hat and the Kamehameha button except by certain persons.

The most important law after those of 1827 and 1829, and which may be considered the first penal code at all worthy of the name was that of 1834, published in a pamphlet of 15 octavo pages.¹ This was in five divisions or chapters, which treated of murder, theft, unlawful sexual intercourse, fraud, and drunkenness respectively. Each division was signed by

² The law of March 20, 1838, was printed in 1 Haw. Spec. 335, with a statement that under it only two houses were given licenses instead of twelve or fourteen as had been the case under the earlier law; the law of Aug. 21, 1838, was printed in Id., p. 390; it was enacted at Lahaina, and seven days later the premier added at Honolulu the following: "Foreign consuls, philanthropists, and all friends of order, are respectfully requested to lend their aid to enforce the above wholesome and important regulations." On March 13, 1838, the king had given notice that at the expiration of the existing licenses, which were for six months at a fee of \$40, he would reduce the grog shops to two in number, and the premier at Waikiki two days later added that they were devising a law for regulating the two houses and that it would be printed when fully decided on.

¹ Copies of this are very rare. This society owns one.

the king. Definite and alternative penalties were prescribed, and degrees and matters of aggravation and principals and accessories were recognized and the penalties graded accordingly. The division on sexual intercourse, besides covering adultery, bigamy, rape, prostitution and letting houses for prostitution, provided for a certificate of divorce on the ground of adultery or cruelty and that the offender should not remarry until the death of the other party. The divisions respecting murder and drunkenness were enacted with amendments as separate laws the next year, and the year preceding a law had been enacted prohibiting the carrying and use of dangerous weapons on shore by persons belonging to visiting ships.¹

The laws that caused the greatest difficulties during the '30s were those against the Roman Catholics, who first arrived July 7, 1827. On August 18, 1829, attendance at their worship was forbidden to the natives; on April 2, 1831, Kaahumanu ordered the priests to leave the country, which they did December 24, 1831; on April 17, 1837, they returned, and on April 29 the king issued an order confirming that of Kaahumanu; others arrived on November 2 of the same year and on December 18 the king and chiefs enacted a law prohibiting the teaching of that religion and forbidding the landing of such teachers. A number of native Catholics were punished. All this gave rise to many difficulties, in which the captains of various war vessels took part. Finally on the advice of the missionaries, particularly Richards and Bingham, who had at various times protested against such persecution, as well as on the protests and advice of others, the Edict of Toleration of

¹ See Blue Book, pp. 156, 159, 162.

June 17, 1839, was issued.² The king and chiefs attempted to justify their action partly on the ground that the Catholics, unlike the Protestants, had not first obtained permission to land and teach—a point upon which they were rather particular; partly on their belief that the Catholics had been implicated with the British consul, Governor Boki and others in certain conspiracies against the government; and partly because of their belief that the new religion was in violation of the law of 1819 abolishing the old religions and taboo system—the use of the crucifix, the veneration of relics of the saints and the fasts being regarded by them as similar to the ancient worship of images and dead men's bones and the taboos on meat, which had been prohibited by that law. They naturally found it difficult from past habits of thought to disassociate political and religious ideas, and experience had demonstrated the danger to which the government was exposed from those who desired to return to the ancient order of things; for in 1824, there was a formidable insurrection on Kauai with that end in view; in 1829, there was an armed conspiracy against the regent, Kaahumanu, headed by Governor Boki, who had had the personal care of the king, and again in 1831, after his death, by Liliha, Boki's wife, both of which were headed off; and in 1833, when the king on arriving at the age of twenty

² Although regarded as of great importance and referred to by many writers of that time, I have found no evidence that it was written. There is some negative evidence tending to show that it was not written. Slightly different statements are made as to its substance, which seems to have been that thereafter no force but only moral suasion should be used against the Catholics. It was issued at Lahaina. Mr. Bingham, in Honolulu, hearing, about that time, that certain persons were being persecuted, addressed a note to the premier, Kekauluohi, who had succeeded Kaahumanu II ten days before and was sometimes called Kaahumanu III, asking if such were the case, and received the following reply, dated June 18: "I have seen your letter. We have exercised that oppression. But it is brought to an end. Henceforth, it will, doubtless, be the rule to admonish." Bingham, *Sandwich Is.*, 535. Kekauluohi took the premiership for the infant Victoria Kamamalu, who was naturally next in the line of succession and who was to take the title Kaahumanu III.

formally assumed full possession of his office, Liliha came near inducing him to put her in Kinau's place as premier. On the arrival of the French frigate "Artemise," Captain Laplace, the month after the Edict of Toleration, the government was required at the mouth of the cannon to comply with certain unjust demands based on its treatment of the Catholics.

The king and chiefs, feeling that political progress should be faster than they could effect without further instruction, wrote to the United States in 1836 for a teacher of the science of government just as they already had teachers of religion and general knowledge.¹ Meeting no success in this direction, they repeatedly requested the missionaries for such instruction until finally in 1839 Mr. Richards was detached from the mission for that purpose. He delivered a course of lectures on this subject and continued afterwards in the service of the government. To these lectures the issuance of the Edict of Toleration, already referred to, was largely due. But ten days earlier, June 7, 1839, a still more important act was proclaimed. It was nothing less than the first constitution and first civil code. It was published in a pamphlet of 24 duodecimo pages.² It is customary to speak of the first part of this as the "Declaration of Rights," and of the constitution of 1840 as the first

¹ This letter also requested as teachers, a carpenter, tailor, mason, shoemaker, wheelwright, paper maker, type-founder, agriculturists, cloth manufacturers, and makers of machinery, and was signed by the king, the premier and thirteen chiefs. It is set out in Anderson, Haw. Is., 76; Bingham, Sandwich Is., 496.

² Entitled "He kumu kanawai, a me ke kanawai hooponopono waiwai, no ko Hawaii nei pae aina." A second edition was published in 1840. This may have been with amendments (but probably not), for it contains, besides the declaration of rights, 13 sections and 7 minor divisions, while that of 1839, which the writer has not seen, is represented as containing 8 minor divisions besides the other matter. See 2 Haw. Spec., p. 345; 36 Miss Her., 101, each of which contains a translation of the declaration of rights and the substance of the rest of the law. The declaration is published in other works, such as Anderson, Haw. Is., 237, and the entire law as amended constitutes the first part of the constitution of 1840 and all of ch. 3 of the Blue Book. The pamphlet is very rare. There is a copy in the Public Archives.

constitution. It, of course, was a declaration of rights and a part of it was so entitled when, with amendments, it was repeated as a part of, or rather a preamble to, the constitution of 1840, which itself contained a further and more definite bill of rights, but it was entitled "constitution" at the time and was such in matter and form, for it contained what is properly constitutional matter, namely, a bill of rights, and this, not as ordinary law, but as a statement of general principles or limitations on the exercise of governmental functions, and with the express provision that laws should not be enacted at variance with them. It is often referred to as Hawaii's magna charta. In general, it secured the common people and chiefs, with emphasis on the former, in their rights of person and property, and provided that laws should not be made to favor the chiefs, and further, that if a chief should persist in violating the provisions of "this constitution" he should cease to be a chief, and that the same should be true of governors, officers and land agents¹—in marked contrast to the irresponsible absolutism and favoritism of earlier times. The portion² considered as law, and described in the title as the "law regulating property," but much of which was organic or constitutional, considering the organization of the government at that time, consisted of 13 sections and 7 minor divisions. These covered the subjects of taxation, fishing rights, water rights, rents, land tenure, descent, education, duties of governors, chiefs, landlords, tenants, tax officers, etc., and contained provisions for the encouragement of thrift, the starting of new

¹ The drafter of the law suggested omitting this penalty, but the chiefs insisted on retaining it,—but one of the amendments made in the declaration as contained in the constitution of 1840 provided for the reinstatement of a deposed chief upon his changing his course and observing the laws.

² This part constitutes the bulk of the entire enactment and from a practical standpoint was more important than the "declaration of rights" part, which alone is usually referred to—perhaps because it is supposed to have been the whole law owing to the fact that it has usually been published by itself elsewhere and the entire original law has not been generally accessible.

industries and the taking up of new land by those who were without land. Tenure was practically made perpetual, subject to forfeiture for non-payment of rent. Not only were rights of person and property secured by general and specific provisions but taxes were made definite and were greatly reduced and opportunities for oppression were greatly lessened by practically permitting only one mesne lord between the king and the common man. It was the most important law since the abolition of the ancient religious and taboo system twenty years before, and one of the most important ever enacted in Hawaii. There was little said of the legislative power, but the governors were forbidden to make laws without the approval of the king, and the course of procedure for obtaining a new law was prescribed; the chiefs entitled to sit in the council were to receive one-tenth of the taxes collected from their lands; by a unique provision persons successfully recommending improvements in the laws were to be rewarded by admission to the council, and the council was to meet annually in April.¹ The preparation and enactment of this constitution and law furnish a good illustration of the usual course of procedure. It was first drafted by a graduate of Lahainaluna by direction of the king but without definite instructions as to what it should contain. As so drafted it contained only about one-third of what it finally included. The king and chiefs then discussed it several hours a day for five days and then ordered it rewritten. It was then discussed a still longer time and again ordered rewritten, and finally passed unanimously.

The next important step was the adoption by the king and chiefs of the constitution of October 8, 1840. This contained the declaration of rights already referred to but with several amendments and an additional bill of rights, which included a declaration of religious liberty. The earlier Declaration of Rights, notwithstanding statements of some writers to the contrary, contained nothing on this subject, and the Edict of

¹ This was the month for the meeting of the legislature until 1887, when it was changed to May, and that was the month until the change to February in 1894.

Toleration was issued principally, if not solely, with reference to Catholicism. The important feature of this constitution was that it added a declaration, though meager, of the general frame of government. It differentiated governmental functions, but left them still to be exercised by the same persons. For instance, the king, premier and four others, elected by the council (both houses), were to constitute the supreme court, and the governors were to hold the courts next in rank;¹ the council of chiefs was to be a privy council as well as a legislative body, etc. The whole was, as already stated, a declaration of an existing rather than a creation of a new frame of government. Contrary to statements often made, there was no creation of a House of Nobles, although members were thereafter usually called nobles in the English language; there was merely the declaration, similar to that in the proclamation of 1829 referred to above, that "at the present period, these are the persons who shall sit in the government councils," naming the king, premier, and fourteen chiefs.² This was merely a continuation of the old council of chiefs, which since 1829 had grown from twelve to sixteen in membership. Contrary also to the usual statements, the council did not consist merely of the fourteen chiefs, nor were they appointed by the king nor was their office hereditary. The king and premier were active members, as they always had been, and the king presided; the others were already members and their successors or additional members were to be made such by law, that is,

¹ This last was by inference and previous custom rather than by direct provision. The governors were given express authority to appoint judges, which was understood to include judges of superior jurisdiction such as the governors themselves had (see *Evol. of Haw. Jud.*, *Haw. His. Soc. Paper No. 7*, p. 15), as well as inferior judges. They had long before begun to appoint distinctively judicial officers, as when five men were so appointed by the governor of Kauai in 1829 (26 *Miss. Her.*, 107).

² The literal translation is "council of chiefs." It included, besides the king and premier (a female), the four governors, four females of high rank and a number of chiefs of the third rank. A different translation is: "In the public councils of the chiefs, these are the counsellors for the current period." Bingham, *Sandwich Is.*, 562.

they were practically to be elected by both branches of the legislature, and were to hold at the will of the legislature, that is, practically for life or during good behavior.¹ The act of 1839, as already stated, had provided for the admission of others, even common people, who earned that reward by successfully recommending better laws. This constitution took the advance step of providing that there should be "annually chosen by the people certain persons to sit in council with the chiefs and establish laws," the mode of choosing and the number to be determined by law. The two houses were to sit separately, but were permitted to unite when they thought it necessary to consult together. No law could be made except by a majority of each house and the approval of both the king and the premier, each of whom therefore had an absolute power of veto.² A few weeks later, November 2, 1840, the number and mode of choosing representatives was fixed by law—the first election law.³ There were to be one person from Kauai and two from each of the other three principal islands; voting was to be by ballot, but the ballots were to

¹ The provision of the constitution was: "Should any other person be received into the council, it shall be made known by law." This was not fully understood at first, for on April 5, 1845, the nobles alone elected eight new members before the lower house was able to attend, on account of a prevailing influenza, and at other times both before and after that date a few members were added apparently by common assent, but on May 12, 1852, a month before the adoption of the new constitution, an act was passed reciting these irregularities and this clause of the constitution, and declaring such of these persons as were still living to be members and ratifying their acts, as well as providing for two new members. In 1850, as stated below, the cabinet ministers were made ex-officio members of the house of nobles by law. Doubtless ideas of rank and heredity were such as to determine largely who should be admitted to the house of nobles during this period. Even the crown was not strictly hereditary, but the succession in theory rested largely with the council. See *Consts. of 1840 and 1852*, and manuscript by Richards in Public Archives, *supra*.

² The veto power was probably not exercised at all for some years and was never exercised much until the establishment of territorial government.

³ Blue Book, ch. 2.

consist of letters, a form for which was prescribed, addressed to the king recommending the persons desired; the persons for whom most signatures were obtained were to be the ones chosen; there were also provisions to guard against forgery and repetition of signatures. Another act, of the same date, provided for the promulgation of laws.¹ Another,² passed a week later, prohibited the chiefs, the governors and the king himself from making laws of general application except in council as prescribed by the constitution. This constitution also manifested a marked advance in the conception of the distinction between fundamental and ordinary statute law, and yet, as in Hawaii previously and always in England the legislative body might alter the unwritten constitution as well as the unwritten law, and as it may in continental Europe practically alter even the written constitution by enacting inconsistent laws which the courts cannot hold invalid, so the king, governors and council did not always comply strictly with this constitution, and by a law of May 31, 1841,¹ even went so far as to provide expressly that "the king, the premier and the chiefs resident near" might pass new laws between sessions to remedy newly discovered evils, subject to confirmation or annulment by the next legislature. By a law of May 18, 1841, judges were authorized to punish crimes not defined by statute, but they were to do so as far as possible in accord with the new system and its principles.² The constitution, however, was indefinite, elastic and largely declaratory and so did not seem to the native mind to alter previous conditions much as to the frame of government.

¹ Blue Bk., ch. 1.

² Blue Bk., ch. 4.

¹ Blue Bk., p. 91.

² Blue Bk., ch. 25. Governor Kekuanaoa may have enacted an ordinance for the city of Honolulu as late as Aug. 25, 1843. This related to animals and nuisances on streets, obstruction of streets and to fires, and required persons to clean the street in front of their premises and the premises themselves once a week; also to water the trees and replace dead ones, for "ornament and shade." This, however, purported to be "enacted according to law" and may have been intended merely as a notice for the enforcement of some law passed by the legislature,

This seems a fitting place to digress slightly in order to touch on the general subject of the exercise of legislative power by bodies other than the legislature in Hawaii. No more than passing reference need be made to the treaty-making power, or to the exercise of legislative power by the privy council under the monarchy or the council of state under the republic in appropriating money in cases of emergency between sessions of the legislature, or to the power of courts, boards of health, etc., to make rules and regulations having the force of law.

First, as to direct general legislation by the people. No Hawaiian constitution has ever authorized a referendum of general laws of any kind to the people. Not even the operation of any law, such as a liquor law, in particular localities, has ever been referred by the legislature to the people of the respective localities. Not even a constitution has ever been submitted to the people. Those of 1839, 1840 and 1852 were enacted by the legislative body. Those of 1864 and 1887 were proclaimed by the king. A convention, partially elective, was called for that of 1864 but after sitting some time was dissolved by the king because of its inability to yield to his desire to impose a property qualification on voters. That of 1887 was in a sense of popular origin for it was forced from the king in pursuance of action taken at a popular mass meeting. The only constitution adopted even by a convention called for the purpose, but only one-half of which was elected, was that which established the Republic in 1894. Several amendments have been made, in the manner prescribed by nearly all the constitutions, by adoption at one session of the legislature and passage at another after a general election.

In the other direction—that of local government—which implies local election of officers and local enactment of ordinances, it has generally been supposed in recent years that no such thing ever obtained in Hawaii until the establishment of county government in 1905, excepting that district road boards were elected from 1890 to 1894. That, however, is not so. From 1851¹ to 1859, not only were the district road super-

¹ Act of July 11, 1851.

visors elected, but they were required to submit to the vote of the road-tax payers of their respective districts all questions of laying out new roads or closing old ones. By a law of May 21, 1841, provision was made for the election of school committees by the male parents of townships, districts and villages. But, what is particularly interesting, an act² of November 9, 1841, after reciting that many little evils existed in villages which the general laws could not correct, because the circumstances of one village differed from those of another, provided that the people of any village, township, district or state, might enact laws respecting roads, fences, animals and any other law not at variance with the laws of the kingdom nor on a subject of universal importance, and provided for the calling of meetings of the people for this purpose by various officers on the application of those who desired the law. Here was the whole theory and practice of local government, and the ordinances were to be enacted not by a board of supervisors but by an old-fashioned New England town meeting. This was significant of the extent to which popular rights had come to be recognized. It was, however, a mere democratization of the ancient system, which was one of local government carried to an extreme except that it lacked the popular or representative element. As Mr. Richards wrote earlier in the same year, in ancient times "an island was divided into mokus or states, a moku into kalanas or counties, a kalana into ahupuaas or townships, an ahupuaa into ilis or plantations, an ili into moos or small farms,"¹ and, as we have seen above, in those ancient times each chief possessed almost supreme legislative as well as executive and judicial power over his own territory, subject only to his superiors.²

² Blue Book, ch. 4.

¹ Manuscript, in Public Archives, *supra*.

² Carrying out the ancient idea that each could make laws for his own territory, that is, subject only to his superiors, this act of 1841 provided also that all private individuals should enjoy the same privilege as villages, etc., in making laws applicable to their own premises, subject to the usual limitations. This ancient power in private persons had been recognized in the proclamation of Oct. 7, 1829, referred to above.

To return to the thread of our narrative, a number of other laws were passed in 1840, some before and some after the adoption of the constitution, on larceny, burglary, manufacture of intoxicating drinks, marriage and divorce, police, roads, weights and measures, schools,³ and the act of the preceding year respecting property was reënacted with amendments.

PERIOD OF RAPID DEVELOPMENT—1841-1852.

In 1841 the council passed many laws, including criminal laws,¹ laws relating to servants, apprenticeships, labor contracts, prison labor, debts and usury, attachments, fences and estrays, bailments, parental duties, and the law already referred to relating to local government, etc. Perhaps the most important law was one in regard to schools—the first comprehensive school law. One of its provisions was a civil service reform requirement to the effect that no one born since the beginning of Liholiho's reign who did not understand reading, writing, geography and arithmetic should hold office.² This was the first session at which there was a lower house, three representatives having been chosen. The first compilation of the laws was then prepared and published, containing the constitution of 1840 and 43 chapters of laws, but not all arranged in chronological order. In 1842 a number of laws were passed on various subjects, the most important of which was one relating to courts and juries—the first judiciary act. Another law distinguished between the personal and political characters of the king, premier, governors and other officers by providing that none of them should use government property for private purposes, but that all such property should be at the

³ Referred to in Blue Book, p. 67, but not printed in that book.

¹ Chiefly on murder, larceny, sexual intercourse, assaults, counterfeiting, perjury, forgery, gambling, disturbance of night, heedless riding and vagrancy.

² Also that no one born since that date who could not read and write should marry, unless ignorance was due to misfortune, such as distance from school, and not to laziness.

direction of the national council.¹ The laws of that year were added to the compilation of 1841 and all were published as the compilation of 1842. This contained the constitution and 55 chapters (besides one unnumbered chapter) covering 200 duodecimo pages in the English edition, translated by Mr. Richards.² It included some laws passed as early as 1833, and some that had their origin as far back as oral laws of 1823. Not a law in the book had a single adverse vote on final passage. They were all discussed and amended until every member of the council who was present was satisfied.¹

This compilation was called at first the "Laws of the Hawaiian Islands," later the "Old Laws," and more recently the "Blue Book," from the color of its cover. Some have lately called it the "Blue Laws," and opprobriously referred to it in

¹ Other laws were on tax officers, taxes and duties, quarantine, attachments, schools, escapes, and banishment (to another island).

² This entire translation has been reprinted in the *Hawaii Holumua* newspaper, beginning June 6, 1894, and in a duodecimo volume from the same type; also in Report of Subcommittee on Pacific Islands and Porto Rico to U. S. Senate, 1901, Part 3, p. 257; and in Thurston's "Fundamental Law of Hawaii," 1904, p. 1. The constitution and part of the laws were published in the *Polynesian*, beginning March 6, 1841, but the paper suspended before all the laws were published. The constitution alone has been printed in 4 Wilkes, U. S. Expl. Exped., 21; Jarves, Hist., 316; and, with Rules of House of Representatives, etc., in a pamphlet in 1851; and, a different translation, in Bingham, Sandwich Is., 562.

Nearly all Hawaiian laws have been published both in newspapers and in book form in both languages, excepting that most of the individual laws before the compilation of 1842, the unenacted compilations of 1884 and 1897, and the Penal Code of 1869 and Revised Laws of 1905 which were enacted as a whole by reference, were not published in newspapers; and some laws enacted before 1840 were not published at all in English, and the compilation of 1841 was not published in English except as part of the compilation of 1842; and the session laws and Revised Laws enacted since annexation have not been published at all in Hawaiian. The Hawaiian version controlled until 1859, since which time the English version has controlled. See Revised Laws, Sec. 24 and note.

¹ Gov. Kuakini of Hawaii was not present when the constitution was adopted and when it was sent to him he thought that the governors' powers were too greatly limited.

that light as the work of the missionaries.² But there is ample evidence of the most satisfactory kind that the missionaries had nothing to do directly with the suggestion, preparation or enactment of these laws. A few were proposed by foreign visitors and residents, consuls and commanders of vessels, and a few were originally drafted by them, but nearly all were the work of the Hawaiians exclusively.³ They were, however, for the most part indirectly the work of the missionaries and, as such, one of their grandest monuments, for, crude and quaint though they are, the wonder is that they were so far advanced. The press, the schools, the churches of the missionaries, and their noble lives tell the reason. It took Hawaii just a score of years after the arrival of the missionaries to attain magna charta, religious liberty and constitutional government. It took our forefathers six centuries after the arrival of the missionaries to attain magna charta and five centuries more to attain religious liberty. It is true, governmental functions were still somewhat mingled, but in some of the American colonies the governors and legislative councils acted as supreme courts or judges down to the time of the Revolution.¹ It was best that development should proceed on natural lines

² E. g., it was published, as stated in a preceding note, in the *Holomua* newspaper, under the heading "Hawaii's 'Blue Laws,' constitution and laws framed by the missionaries," in order to show, as ironically stated in the editorial, "the love and good will of the first missionaries, through their work as legislators"; and in the Report of the Senate Subcommittee, also referred to in the same note, as an exhibit presented to the committee as "Hawaii's 'Blue' Laws—constitution and laws of 1840—a practical illustration of the missionaries' love for the Hawaiians."

³ Written chiefly by David Malo, Boaz Mahune, John and Daniel Ii, and Timothy Keaweii. John Ii was afterwards a justice of the supreme court.

¹ It is true also that penal offenses were not all defined by statute, but that is so in some states at the present time. The punishments, moreover, extended beyond death, imprisonment and fine to irons, whipping and banishment (to another island, generally Kahoolawe), but they were not more severe and were administered more humanely than is the case at present in some civilized countries. Some leading jurists now advocate a return to whipping for certain offenses. Provision was made for pardons in case of good conduct. There was nothing in these laws suggestive of the alleged blue laws of Connecticut. The most competent critics of the time were of the opinion that the laws were so advanced that the main difficulty lay in their administration because of the inexperience and incapacity of the officers and ignorance of the masses.

a little longer. The editor of the "Polynesian," after referring to the good intentions of the council, soon after it met in 1841, well said: "Perhaps the greatest difficulty now to be feared is their legislating too fast and too far for the present condition of their subjects. They have a difficult course to steer to reconcile the rapidly advancing interests, numbers and wealth of the foreign population with the incipient state of their own."

That was the problem for the next few years, during which there was little legislation, but marvelous growth, largely through lessons learned from friction with foreigners, which resulted in lawsuits, diplomatic correspondence, embassies abroad, and even seizure by the British and occupation by them for five months in 1843, and finally vindication, restoration, and recognition of independence by the United States in 1842, Great Britain and France in 1843, and Belgium in 1844.

In April, 1843, the council held its regular session, a short one, during the British occupation, and enacted a law amending many former laws, which was published in a small pamphlet, and part of which was suspended by the British Commission,¹ and in August held another short session, at which it enacted an important law² relating to juries, leases of government lands, sales of lands to foreigners, liquor selling and providing for the erection of prisons on the principal islands. No session was held in 1844.³

The year 1845 marked a tremendous advance. Two thoughts predominated—one of encouragement from escaped dangers and the recognition of independence, the other of deep conviction of the need of such legislation as would meet the

¹ By its terms it was not to take effect until submitted to the Commission. The pamphlet was of six duodecimo pages, including the title page and its blank verso. It is now rare.

² Law of August 11, 1843, in Public Archives. Under this, prisons were erected on all the islands. Report of Min. of the Interior to Legislature, May 21, 1845, p. 10.

³ But the king, with the approval of the chiefs, issued a code of official etiquette on June 29, 1844.

new conditions and prove Hawaii worthy of membership in the family of nations. The council had become known as the legislative council, and its branches as the House of Nobles and the House of Representatives. The session was held at Honolulu, instead of at Lahaina. The Nobles met first and transacted some business, and finally on the 20th of May, when the prevailing influenza permitted, the legislature was opened for the first time by a formal speech from the throne, followed the next day by the reading of elaborate reports from the members of the cabinet, which had already been formed without the aid of statute. The report of prime importance was that of the Attorney General, John Ricord, who, upon touching here, had been persuaded to remain. He was the first lawyer in Hawaii, a young man of ability, industry and high purposes, versed in the common and the civil law, and had once before aided in "giving impulse to the organic action of a forming government."¹ He presented a report on inferences in the constitution, in which he discoursed at length on the nature and limitations of constitutional government and of the three coördinate departments, the need of more definite laws, particularly those of a criminal nature and those relating to the jurisdiction and procedure of the courts, expounded the powers implied in the constitution and suggested the outlines of five organic acts. In pursuance of a resolution² passed by the legislature a month later he set about the drafting of the proposed acts. These, when prepared, were submitted to the king in cabinet council for discussion and amendment, translated into Hawaiian by Mr. Richards, reported to the legislature, and passed by it through three readings section by section and more or less amended. The first, which was an

¹ He was originally from New York, was appointed Attorney General March 9, 1841, and resigned May 17, 1847. He closed his last report to the legislature, April 28, 1847, with these words: "Providence has once before allowed me to aid in giving impulse to the organic action of a forming government, since merged into a mighty nation. The archives of that sovereign State (Texas) for the years 1836 and 1837, enroll my name among those whose labors contributed to its independence."

² Joint Resolution of June 24, 1845.

act of nine pages organizing the executive ministry and known as the "First Act of Kamehameha III," was passed at an adjourned session of the same year. The "Second Act of Kamehameha III," covering 254 pages, organizing the several executive departments of the interior, foreign relations, finance, public instruction and law, was passed the next year. It was a part of this act, the importance of which can hardly be exaggerated, that established the board of commissioners to quiet land titles, which, by awarding in fee simple to the several chiefs and common people the lands occupied by them, completed the evolution of the feudal into the allodial system. This act established also the system of recording deeds. Both of these acts, with a few resolutions, were published in one volume. The "Third Act of Kamehameha III,"¹ of 63 pages, organizing the judiciary department, in the preparation of which Ricord was aided by Judges W. L. Lee and L. Andrews, was enacted in 1847, and published with other acts and resolutions of that year in a separate volume. These three acts have been the basis of Hawaiian organic law ever since, as well as of much law not strictly organic.² They went far towards completing the separation of legislative, executive and judicial functions, and, in many respects, though ingeniously justified as declarations of powers implied in the constitution, were in reality amendments of that instrument. Indeed, the constitution had already been extensively amended by natural growth.

The remaining two proposed acts, namely, the penal code and the civil code, though begun, were never completed. But

¹ Prepared in pursuance of Joint Resolution of Nov. 10, 1846. Among other things, it expressly permitted the courts to adopt the principles of the civil as well as the common law. In 1892 the common law was prescribed except as changed by statute, precedent or usage.

² E. g., the common law as to married women was incorporated with very little change in the act of 1846, much against the views of many Hawaiians, among whom women had previously been on much the same footing as men. This was one of the few instances of undue haste in adopting the so-called enlightened laws of civilized nations. This remained law until 1888.

later in 1847, after Ricord's resignation, the legislature passed a resolution³ requesting Judge Lee to prepare such codes, and, after a session in 1848, at which, among other laws, it passed that by which the lands held by the king in his two-fold political capacity were separated into the public and crown lands, and after a dissolution in 1849 without passing any acts, it enacted in 1850 the penal code prepared by Judge Lee. This covered 133 pages. Much of it was borrowed from the proposed penal codes prepared by commissioners for Massachusetts and by Mr. Livingston for Louisiana. It has been the basis of Hawaiian criminal laws ever since.¹ With the penal code were published the other acts of the same year, the most important of which were those on schools, descent and contract labor, the last of which, now repealed, played so important a part in the history of these islands.

At this session also were enacted two important laws affecting the law-making power. One was an election law, which changed the form of ballot from the old open list of signatures to that of separate secret ballots, and provided that only citizens and denizens twenty years old, and not insane or convicted of an infamous crime, could vote. The other increased the representatives from seven to twenty-four—thus greatly strengthening the popular branch of the legislature—limited them to citizens and denizens twenty-five years old who could read and write and understood accounts, and gave the cabinet ministers seats, with the right to vote, in the House of Nobles—a step towards ministerial responsibility. The civil code was never prepared.

The time had now come for a modern constitution to conform to the changes that had taken place since that of 1840. Accordingly, in 1851, the legislature, besides passing a number

³ Sept. 27, 1847.

¹ A second edition of the Hawaiian version was published in 1852. The penalties were limited to death, imprisonment and fine, except that whipping remained as an alternative punishment for larceny in the fourth degree in the case of males until 1872.

of acts including important acts on prisons and guardianship,¹ provided for the appointment of three persons by the king, nobles and representatives respectively to revise the constitution, and the constitution so prepared, chiefly by Judge Lee,² who was appointed by the representatives, was adopted at the next session. This has been the basis of all subsequent constitutions. In general the three powers of government were to be "preserved distinct," and, specifically, legislative and judicial powers were not to be "united in any one individual or body." Many provisions³ were made in regard to the legislative body as well as other bodies, of which mention need be made only that the nobles were to be appointed for life by the king instead of by law, and were not to exceed thirty in number; that the representatives were to number not less than twenty-four nor more than forty, and that to the qualifications of voters was added that of payment of taxes. The privy council was separated from the house of nobles. The king, premier, and four nobles were no longer to constitute the supreme court. The law-making body was called the legislature, and the king was named as a third and coördinate branch instead

¹ Borrowed from Massachusetts.

² Then chief justice of the superior court of law and equity, afterwards chief justice of the supreme court. Dr. G. P. Judd, minister of finance, was appointed by the king, and John Li, a noble and judge of the superior court, afterwards a justice of the supreme court, by the nobles.

³ Among these were provisions that each house should be judge of the qualifications of its members; a majority should be a quorum, but a smaller number might adjourn, and compel attendance of others; each house should choose its officers and make its rules of procedure, might punish non-members for contempt, and its own members for disorderly behavior; should keep a journal and enter ayes and noes at request of one-fifth; members should be privileged from arrest when attending, going or returning, and not be held to answer for any speech; nobles were to sit without pay, representatives' pay to be fixed by law but not to exceed three dollars a day; nobles were to be a court of impeachment, representatives to make impeachments; representatives were to be apportioned according to population every sixth year; a form of enacting clause was prescribed and every law should embrace but one object, which should be expressed in its title.

of a member of the council of chiefs or house of nobles. Revenue and appropriation bills were to originate in the house of representatives.¹

This completes the strictly formative period of Hawaiian statute law. Growth has continued since, but it has been largely through such changes by session laws and constitutional alterations as might naturally occur in a matured state. All subsequent codes have been mere compilations or revisions of previous laws.

PERIOD OF MATURITY—1852-1905.

Annual sessions continued to be held from 1852 to 1856, among the more important acts being those of dower in 1852,² the judiciary act and acts of summary possession and divorce in 1853, and garnishment and corporations in 1856. The number of representatives was increased from twenty-four to twenty-seven in 1853 and legislative sessions were made biennial in 1856. In pursuance of a joint resolution of the latter year the "Civil Code of 1859" was prepared and submitted in 1858, and enacted in 1859. This was not a new code but a compilation and revision of former statutes with some important alterations. The other acts of the same session were published in the same volume. The session lasted 140 days and was by far the longest up to that date.¹

¹ This constitution, which took effect the first Monday in December, 1852, was published in a pamphlet at the time; in the Laws of 1852, p. 2; the Laws of 1860, p. 47; and Thurston's Fundamental Law, 1904, p. 155.

² Borrowed in part from Massachusetts.

¹ The joint resolution, dated June 30, 1856, named Prince Kamehameha, Chief Justice W. L. Lee and Associate Justice G. M. Robertson as the committee to prepare the code. Notes of reference to decisions were to be added, but this was not done. On Judge Lee's death, during the progress of the work, Chief Justice E. H. Allen was appointed in his place. The work was presented to the legislature in June, 1858, and, after it was examined for some months by a joint committee of five members from each house, was taken up at an adjourned session on the first Monday in December section by section and with amendments passed May 17, 1859. Besides being published in the octavo volume, of which it covers 363 pages, it was published in a newspaper, single column, small type, and from the same type was printed in book form, quarto, 40 pages, including index, three columns to the page. This edition is rare.

The lower house had grown in numbers and influence. Its membership included some foreigners (citizens or denizens) of ability and character. It was the working branch of the legislature and was the more dignified of the two houses. The grand old chiefs were passing away, and the nobles, appointed by the king, were becoming subservient to him and his ministry.¹ There was much friction between these and the lower house. After a long and severe contest in 1859 the representatives had defeated a cabinet measure to extend the liquor traffic to the Hawaiians, and had succeeded after several years of effort in imposing the first general ad valorem tax on real property.² In 1862 they compelled a cabinet to resign, chiefly because of the incompetency, due to intemperance, of the minister of finance. This was regarded as a decisive gain in the direction of ministerial responsibility. The long reign of the patriotic, liberal and progressive Kamehameha III had come to a close at the end of 1854. Kamehameha IV was reactionary in his tendencies. In 1859, he and his ministry procured the first passage of constitutional amendments permitting those of his ministers who were not nobles to sit with the representatives, permitting appointments of nobles for years as well as for life at his option,³ and requiring representatives to own real estate of the value of \$1,000 or be in receipt of an annual income of the same amount. These, however, were lost at the session of 1860. The first passage of other amendments was procured at the session of 1862, permitting appointments of nobles for not

¹ In 1862 it was said that there were usually only about ten nobles in attendance, and that these wore their hats (as in the British parliament), smoked and put their heels on the desks when in session.

² $\frac{1}{4}$ of 1%. Now 1%. Previously the real property tax had been, as in ancient times, specific on ahupuaas, ilis, etc., of land.

³ While this provision might tend to make the nobles more subservient, it was considered by many liberals a step in advance, as it might facilitate the strengthening of the house of nobles by additional appointments of able natives and foreigners. Similar attempts have been made to strengthen the British house of lords in its judicial capacity by life instead of hereditary appointments.

less than five years as well as for life and imposing a property or income qualification of \$250 on representatives, but before the following session the king died, and his brother, Kamehameha V, still more reactionary, omitted to take the oath or convene the legislature at the usual time in 1864, and, instead, summoned a convention to revise the constitution. This consisted of himself as president, the nobles, sixteen in number, and twenty-seven elected delegates, sitting together. When its labors were nearly completed he dissolved it, because of its refusal to impose a property qualification on voters, and proclaimed a new constitution.¹ This followed the constitution of 1852 in the main, but reduced the power of the representatives by requiring the two houses to sit together and not requiring revenue and appropriation bills to originate with the representatives, though it also lowered the maximum number of nobles from thirty to twenty; it also imposed additional qualifications of \$500 worth of real property or \$250 annual income on representatives, and \$150 worth of property or a leasehold worth \$25 annually or an annual income of \$75 on voters, and also ability to read and write if the voter was born after 1840. The law-making body was called the legislative assembly. Although the general provision that the three powers should be "preserved distinct" was retained, the specific provision against the union of legislative and judicial powers was narrowed to a provision that no judge of a court of record should be a member of the legislature. The office of *kuhina nui* was abolished. Thus was inaugurated, to use a comparison made by another,² the Hawaiian Tudor period of reassertion of kingly power, which was destined to be fol-

¹ This constitution, which took effect August 20, 1864, was published in a pamphlet at the time; in the *Laws of 1864*, p. 85; after the index in the *Penal Code of 1869*; in a pamphlet in 1887 in parallel columns with the constitution of 1887; and in *Thurston's Fundamental Law, 1904*, p. 169. It is supposed to have been prepared chiefly by the Attorney General, afterwards Chief Justice, C. C. Harris.

² *Chambers, Const. Hist. of Haw.*, p. 20.

lowed by a Stuart period "in which absolutism was wrecked upon the rocks of revolution."

There were few acts of great permanent value passed at the biennial sessions from 1860 to 1868. Perhaps those of greatest importance and interest were the two of 1865 making the crown lands inalienable and providing for the segregation of lepers, and that of 1860 known as the "Act to Mitigate,"² the last two of which have probably received more attention and aroused more discussion ever since than any others. In 1868 the number of representatives was increased to twenty-eight.³ In 1870, the "Penal Code of 1869," a compilation of that of 1850 and subsequent penal laws without revision, was enacted as a whole by reference.⁴

From the Penal Code of 1869 to the constitution of 1887, the session of 1876 was the most prolific in legislation of permanent interest or value. At that session were passed the long acts on evidence and criminal procedure, and the acts on abatement, garnishment, interpleader, extraordinary writs, and the stamp act.¹ Other acts of special note during this period were those on habeas corpus and limitations in 1870, mortgage foreclosures in 1874, equity jurisdiction and railroads in 1878, partnerships in 1880 and 1886, liquor in 1882,² and the banking, bankruptcy, replevin and homestead acts of 1884. In 1870, the acts of each session began to be numbered and published in chronological order. They were designated as chapters with Roman numerals until the overthrow of the monarchy and since then as acts with Arabic numerals. In 1874 provision was made for the codification and revision of the laws, but,

² No longer enforced.

³ Act of June 22, 1868.

⁴ Prepared by R. G. Davis and R. H. Stanley, of the bar, under the direction of the Supreme Court Justices, E. H. Allen, A. S. Hartwell and J. W. Austin, in pursuance of an act of June 22, 1868, and enacted July 7, 1870.

¹ All supposed to have been prepared by E. Preston, afterwards Supreme Court Justice; the first three were borrowed largely from England.

² Among other things this abolished the prohibition of sales of liquor to natives.

nothing having come of this, similar provision was made in 1880, the result of which was the "Compiled Laws of 1884," an unenacted compilation without revision, consisting of the Civil Code of 1859 as amended, with other matter placed for the most part near kindred subjects between the sections of that code, the original section numbers of which were retained. There were marginal citations of applicable decisions from four volumes of Hawaiian reports. The Hawaiian version was not published until 1889 and contained also the amendments made, but not other laws enacted, at the sessions of 1884 and 1886 and some additional references to decisions.¹

Soon after the death of Kamehameha V, Lunalilo was elected king at a special session of the legislature in January, 1873, at which constitutional amendments were approved abolishing the property qualifications of voters for representatives and restoring separate sessions of the two houses, but only the first of these proposed amendments was finally adopted at the session of 1874. Soon after Lunalilo's death, Kalakaua was elected king at a special session in February, 1874. This marked the beginning of a period of steadily increasing extravagance, corruption, personal interference by the sovereign in politics, procurement of the election of appointed executive and judicial office-holders as representatives, fomentation of race feeling and general endeavor to restore the ancient order of things with its heathen customs and ideas of absolutism and divine right, until, in 1887, the king was forced by peaceful revolution to proclaim an amended constitution.² This provided that no executive or judicial officer or contractor or employee of the government should be eligible to the legis-

¹ This compilation was prepared in pursuance of the act of August 13, 1880. The commission consisted of Chief Justice A. F. Judd, Associate Justice L. McCully and J. M. Kapena. In accordance with their understanding, Judge McCully prepared the English version, and J. M. Kapena the Hawaiian.

² This constitution, which was in force from July 7, 1887, was published separately in a pamphlet at the time; also in a pamphlet in parallel columns with the constitution of 1864; in *Laws of 1892*, p. 343; 5 *Haw. Reps.* 703; and *Thurston's Fundamental Law*, 1904, p. 181.

lature, and no legislator should during the time for which he was elected be appointed to any civil office under the government, except that of a member of the cabinet; made the ministers, who were to continue to sit in the legislature, responsible to it instead of to the king by making them removable by a vote of want of confidence;¹ changed the king's absolute veto to a qualified veto; took from him the appointment of the nobles for life, increased their number from a maximum of twenty to a fixed number of twenty-four, made them elective for terms of six years; made eligible as nobles and qualified as electors of nobles persons of Hawaiian, American or European birth or descent instead of "subjects" only, but required them, both nobles and electors, to have \$3000 worth of taxable property or \$600 annual income, to have resided in the country three years and taken the oath to support the constitution and laws; reduced the number of representatives, who were still to be "subjects," from twenty-eight to twenty-four and made qualified as voters for representatives persons of Hawaiian, American or European birth or descent who had resided in the country one year and taken the oath.² The law-making body was called the legislature.

There was much legislation during the four sessions from the constitution of 1887 to the downfall of the monarchy in 1893. The session of 1888 was particularly fruitful of important acts, but mention will be made only of the married

¹ This was by a direct vote of want of confidence and not, as in England, by an adverse vote on a government measure. The king was to follow the advice of his cabinet, but this was held not to apply to the exercise of the veto power. *Everett v. Baker*, 7 Haw. 229.

² The nobles were also to have paid their taxes and to be able to read and comprehend an ordinary newspaper in Hawaiian, English or some European language. Voters were to be able to read and write in one of those languages (if born since 1840), besides having other qualifications, such as payment of taxes, &c. The educational and residence qualifications were not required of nobles or voters then resident if they registered and voted at the first election. The object was to give bona fide residents other than Asiatics a voice in the government. The educational qualifications in fact excluded most of the Portuguese.

women's act, the Australian ballot act, and the mechanic's lien, postal savings bank and Oahu railway acts, of that session, the general corporation act and acts on quieting titles and garnishment of government beneficiaries of 1890 and the judiciary, writ of error and inheritance tax acts of 1892. Provision was made in 1892 for a codification and revision of the penal laws. Such a code was prepared with extensive changes made in the former laws in accordance with what were believed to be sound modern views and presented in printed form to the next legislature but was not adopted and was never published.¹

Notwithstanding the provisions of the constitution of 1887 and the fair promises of the king, the next few years witnessed a constant struggle on his part and after his death in January, 1891, on the part of the queen, Liliuokalani, to regain their lost powers and extend the royal prerogatives, until the queen, on January 14, 1893, at the close of the longest session ever held, during which many cabinets were appointed and voted out, attempted a *coup d'état* by which she sought to accomplish her object by the promulgation of a new constitution² giving her more absolute power than that of 1864 had conferred on the sovereign, but which resulted in her overthrow and the establishment of the provisional government on January 17 by a second peaceful revolution. The

¹ Prepared under act of Aug. 6, 1892. The commission consisted of Chief Justice Judd, and C. Brown, of the bar, and W. Foster, of the bar and Clerk of the Supreme Court. The work was done by Foster. It was a compilation and revision of Hawaiian laws, but followed the penal code of California to some extent. Offenses were not graded except as felonies and misdemeanors; as a rule only imprisonment or only fine and only the maximum amount was prescribed as the penalty for each offense; an attempt was made also to simplify the procedure. All was divided into 29 chapters on offenses against departments of governments, 40 chapters on offenses against persons, property and society, and 20 chapters on jurisdiction and procedure. Notes showed the origin of the various parts and contained cross references and references to decisions in 9 volumes of the reports.

² What is said to have been the queen's proposed constitution is published in the Blount Report, p. 581, made a part of the President's message to Congress, Dec. 18, 1893.

legislative power then was vested in the executive and advisory councils of that government until the constitution of the republic (which was enacted by them as well as by the convention which adopted it) took effect on July 4, 1894, and thereafter in such councils as the executive and advisory councils of the republic, the latter of which was continued temporarily for the purpose, until the first session of the legislature of the republic.² Laws were enacted by these councils from January, 1893, to May, 1895.

The constitution¹ of the republic made the president responsible, and gave him power to veto specific items in appropriation bills; deprived the cabinet of seats in the legislature, but made them removable as well as appointable by the president only with the consent of the senate, except that any one member might be removed by the president with the approval of the other three members; followed the present English practice of turning election cases over to the courts by giving to the supreme court exclusive jurisdiction of such cases; reduced the membership of each house to 15, and required members to be citizens and to have resided in the country three years; changed the name of the upper house to "senate," and increased the alternative income qualification to \$1200; required representatives to have \$1000 worth of property or \$600 annual income; required voters for members of each house to be citizens or have special letters of denization or a certificate of service in the formation of the provisional government, and voters for senators to have \$1500 worth of real property or \$3000 worth of personal property or \$600 annual income; and

² These councils consisted of 4, later 5, and 13 members respectively. The convention consisted of the 18 members of the councils and 18 elected members. See *Laws of Provisional Government*, Proclamation on p. 1, and Acts 1, 4, 11, 49, 63, 69, 85, also Art. 100 and the last two paragraphs of the constitution, in regard to the councils, the convention and the constitution.

¹ This constitution, which took effect July 4, 1894, was published in a pamphlet at the time; also with the convention proceedings; and in 9 *Haw. Reps.* 732; in both the *Civil Laws* and the *Penal Laws of 1897*, p. 1; and *Thurston's Fundamental Law*, 1904, p. 201.

increased the size of the representative districts so as to apportion two or three representatives to each district for the purposes of the cumulative system of voting, which was provided for.

Among the acts of most importance passed during the three sessions held under the republic were the public land act¹ of 1895, and the audit, rapid transit and limitations acts of 1898. In 1897 a compilation² was published in two volumes entitled "Civil Laws" and "Penal Laws." This was not enacted. The laws were not revised. In the Penal Laws the arrangement of the Penal Code of 1869 was followed and new matter added at the end, but the sections were numbered consecutively throughout the volume. The Civil Laws was based on the Compiled Laws of 1884 and subsequent laws, but rearranged. At the end of each chapter in each volume, a note showed the origin or last amendment of each section in the chapter and the cases in ten volumes of supreme courts reports which referred to sections contained in the chapter. The constitution of 1894 was included in each volume.

Hawaii was annexed to the United States by the treaty approved by the Hawaiian Senate September 9, 1897, the joint resolution of congress of July 7, 1898, and the transfer of sovereignty on August 12, 1898, and no session of the legislature was held until after the establishment of territorial government, on June 14, 1900, by the organic act passed by congress April 30, 1900.¹ This act abolished the cabinet as a body and

¹ Borrowed largely from New Zealand. It covered what had previously been crown lands as well as government lands, the former having become incorporated in the latter by Art. 95 of the constitution of 1894.

² Prepared by S. M. Ballou, of the bar, in pursuance of an item in the appropriation bill of June 8, 1896.

¹ This was prepared by a commission consisting of U. S. Senators Cullom and J. T. Morgan and Representative R. R. Hitt, and President S. B. Dole and Associate Justice W. F. Frear of Hawaii. The last mentioned also hastily prepared a rough compilation of the Civil and Penal Laws of 1897 and Session Laws of 1898 as modified by the proposed organic act. A small edition of this was published in one volume in Washington for the use of Congress in its consideration of the proposed organic act.

substituted heads of departments, but left their appointment and removal in the governor with the consent of the senate; took from the supreme court jurisdiction of election cases and made each house judge in respect of its own members as had been the case before the constitution of the republic; reduced the terms of senators from 6 to 4 years; doubled the number of representatives, abolished all property, income and tax-payment qualifications of senators, representatives and voters, but required all to be citizens, and the legislators to have resided in the Territory three years, and voters one year; and abolished the cumulative system of voting but left the representative districts as they were, so that with the doubled number of representatives, four or six are elected from each district. It also required members of both houses as well as voters to have resided in the district for three months immediately preceding the time at which they offered to register, thus ending the practice which had previously prevailed by which, as in England, any district could, and often did, elect a representative of capacity from some other part of the country.

Among the more important acts passed under Territorial government are the income tax act¹ of 1901, the Torrens' land registration act² and the forestry act of 1903, and the county act, liquor act, inheritance tax act, public archives act, and acts for the trial and probation of juvenile delinquents and the parole of prisoners, passed in 1905³. In 1905 the legislature also enacted as a whole by reference a compilation⁴ of all the laws, known as the "Revised Laws." This included what there was left of the Civil Code of 1859 and Penal Code of 1869 and all subsequent laws. These were published in one

¹ Borrowed from the federal income tax law of 1894.

² Borrowed from Massachusetts.

³ In 1904. Mr. L. A. Thurston, of the Hawaiian bar, edited and indexed a volume entitled "Fundamental Law of Hawaii," containing all the constitutions, the organic act, the Blue Book and other matter.

⁴ Prepared in pursuance of an act of April 25, 1903, by a commission consisting of Chief Justice W. F. Frear, and A. A. Wilder and A. F. Judd of the bar, the former now a justice of the supreme court, aided by C. F. Clemons, of the bar, as clerk.

volume of 1451 large pages, which also included a prefix containing the federal constitution, the treaty and resolution of annexation and the organic act of the Territory, and an appendix containing former land laws and other matter. The index was unusually full. The laws were both revised, though not extensively, and rearranged. Titles, chapters and sections were numbered consecutively throughout the volume. Sections in chapters were arranged in groups and each group given a subtitle, and each section was given a heading. Lines of sections were numbered. Both chapters and sections had notes giving their history, including original enactments, amendments and where found in compilations; giving other matters of interest, cross-references, changes made in the text, and the substance of applicable decisions in fifteen volumes of Hawaiian reports and all federal reports and the opinions of the United States Attorney General. The latest revisions elsewhere were examined and what were deemed the best features of each were adopted with a view to making the volume as perfect as possible in appearance, arrangement, annotations and other respects.

During the third of a century from the first visits of foreigners in 1786 after the death of the discoverer in 1779 to the abolition of the ancient religious and taboo system in 1819 shortly after the death of Kamehameha the Conqueror, Hawaii became largely prepared for the new by losing respect for the old. During the next third of a century, from the arrival of the missionaries to the constitution of 1852, she gradually evolved a fairly modern written constitution, especially in its practical working, an extensive code of organic law, such as will inevitably exist, and a definite criminal code, such as ought to exist, in every civilized state. During the next third of a century—to the constitution of 1887—foreign influence continued to increase until residents of foreign birth or descent were practically on a basis of political equality with the natives. Since then Hawaii has passed from monarchy through provisional government, republic and transition period to ter-

ritorial government. By the end of this third of a century, from 1887 to 1920, a century after the arrival of the missionaries, will she have passed into statehood? On the whole she has been moderate and conservative in her legislation, and such laws as have been enacted have as a rule been prepared carefully and on broad lines. She has indulged little in local, special or private legislation or legislation of a speculative character. She has borrowed freely, where she could, from the best statutes elsewhere, more perhaps from Massachusetts than from any other one state, but also from other states as well as from England, Australia and New Zealand. With the increase of people from the western states, there has been a tendency in recent years to borrow somewhat from those states. She has not adopted the code practice, but she has never adopted useless forms and fictions in judicial procedure. She has not attempted to codify the common law of personal and property rights. Conditions have given her her full share of constitutions but she has built one upon another and confined all to what is properly constitutional matter—a bill of rights and a frame of government. She has enacted only 5,000 pages of laws, exclusive of general compilations and revisions, during the 80 years since she began to print laws, and so many of these have been mere amendments or repeals or consolidations of laws on particular subjects or laws of a temporary nature that all now in force of every description in consolidated form would cover only about 1,000 pages. And yet she is beginning to show signs of infection by what Sir Henry Maine calls “the capital fact in the mechanism of modern states”—“the energy of legislatures,” for she enacted an average of less than 75 pages a session at the 32 sessions held during the 48 years from 1839 to 1887,¹ and has enacted an average of nearly three times that number at each of the 12 sessions held during the 18 years since.²

¹ Including the organic acts of 1845, 1846 and 1847, and the penal code of 1850, and excluding the session of 1849, which was adjourned without enacting any laws. Compilations and revisions are excluded. The year 1839 was when regular sessions began; and the year 1887, when the upper house became elective and the privileges of voting and election were conferred extensively on residents of foreign birth or descent.

² New York has enacted an average of nearly 1900 pages a year for the last six years.

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